Supreme Court of the United States

OCTOBER TERM, 1949

No. 309

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 309, *et al.*, *Petitioners*,

vs.

A. E. HANKE, L. J. HANKE, R. R. HANKE, AND R. M. HANKE, COPARTNERS, D. B. A. ATLAS AUTO REBUILD, *Respondents*.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF OF PETITIONERS

SAMUEL B. BASSETT,
JOHN GEISNESS,
Attorneys for Petitioners.
811 New World Life Building,
Seattle 4, Washington.

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PREFATORY STATEMENT

Respondents' briefs in this case and in the *Cline* case (No. 364) were both served January 26, 1950. Because both cases have been assigned by the Court for hearing during the week of February 6, 1950, sufficient time is not available to the undersigned (who will argue both cases for petitioners) for travel and in which to prepare and have printed a complete reply brief in both cases. For this reason we respectfully request that Parts I and II of the Reply Brief in the *Cline* case be considered as a part of this reply brief.

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I.

OPINIONS OF THE COURT BELOW

The majority opinion of the Supreme Court of the State of Washington is reported in Volume 133 Washington Decisions 625; 207 P.(2d) 206 (R. 18); the dissenting opinion of Judge Robinson (R. 32); and the concurring opinion of Judge Grady (R. 36).

II.

FACTUAL INACCURACIES IN RESPONDENTS' BRIEF

(1) On page 2 of their brief respondents say "No one of them belonged to any union * * *." The trial court found, however, (Finding No. IV, R. 12): "* * *

That upon purchasing said business the plaintiff A. E. Hanke became a member of the defendant Union * * *." Again in his memorandum decision (R. 93) the trial judge said: "On June 22, 1946, he (A. E. Hanke) had joined the defendant Union." And this finding is sustained by A. E. Hanke's own testimony (R. 82):

> "Q When did you join the Teamsters Union, 309?
>
> A We took that over on the 15th of June; it must have been somewhere in the latter part of June or the first of July.
>
> Q (THE COURT): In 1946?
>
> A Yes, in 1946."

Furthermore, the Washington Supreme Court concurred in this finding (R. 20).

The proof also shows, without dispute, that A. E. Hanke continued to be a member of the petitioning Union until January 27, 1948, when this controversy arose, and the trial court so found (Finding of Fact IV, R. 12).

(2) At page 3 of their brief the respondents say that the Union's representatives told them they would have to remove the Union's shop card "*unless at least one of the respondents joined the Union or unless they signed up the agreement to abide by Union rules and regulations in regard to hours and days of labor* (R. 14)." The reference to the record which respondents give in support of this assertion states the very contrary. Page 14 of the record contains the trial court's Finding of Fact No. VIII, which says, in part:

> "That on the 27th day of January, 1948, the defendant Dick Klinge and one E. W. Marshall,

who was the business agent for Teamsters Local No. 882, (the Automobile Salesmen's Union) having had complaints against the plaintiffs for violation in regard to the hours referred to in the agreement between the Dealers and said Local No. 882, went to the place of business of the plaintiffs and there conferred with all four of the partners. *They did not insist on the plaintiffs becoming members of said Local 882 or the defendant Local No. 309, but merely protested as to their violation of the clause of the agreement above quoted.*" (Emphasis supplied)

And again this is sustained by respondent A. E. Hanke's own testimony (R. 82):

"Q And the chief thing he (Union representative) was doing was to ask you to conform to those regulations for opening and closing?

A That is what they said about that.

* * * * * * * * * * *

"Q They didn't complain about anything else, did they?

A No."

In his memorandum decision the trial court summarized what occurred at this interview with the four respondents as follows:

"On the 27th day of January, 1948, Mr. Klinge and a Mr. E. W. Marshall, who was the business agent for Local No. 882, having had complaints against the plaintiffs for violation in regard to the hours referred to in the agreement between the Dealers and Local 882, went to the place of business of plaintiffs and there conferred with all four of the partners. It does not appear that they insisted on the plaintiffs becoming members of Local 882 or Local No. 309, but merely protested

as to their violation of the clause of the agreement heretofore referred to. * * *.

"The main topic of conversation seemed to be that the agents of the Unions would have to take down the shop card on display in the plaintiffs' shop unless they agreed to abide by the provisions in the agreement between the Dealers and the Union as to the working hours. * * *.

"No threats appear to have been made by the agents of the Union to the plaintiffs. All they said was that unless they would keep the hours they would have to take down the Union shop card." (R. 94-95)

The substance of this is also set out in the opinion of the Supreme Court (R. 22).

Thus it conclusively appears from the record

(1) That when this controversy arose one of respondents was a member of petitioning Union and had been such member for approximately eighteen months.

(2) That neither the petitioning Union nor its sister Union, Local No. 882, requested any of the respondents to join either Union, but merely asked that they abide by the provisions of the collective bargaining agreement which the Union had with other automobile dealers in the Seattle area, *as to working days and hours.*

III.

ARGUMENT

THE PICKETING WAS FOR A LAWFUL PURPOSE

The purpose of the picketing under review was to inform Union members and their friends that respondents were no longer operating a union shop, thereby depriving respondents of this patronage, in order to induce them not to sell used cars on Saturdays, Sundays, holidays or after 6:00 P.M. This was a legitimate union objective. The respondents were operating their business in a way deemed by the Union harmful to its members. The right to so publicize the facts of such dispute is guaranteed by the First and Fourteenth Amendments to the Constitution.

Senn v. Tile Layers Protective Union, 301 U.S. 468, 81 L. Ed. 1229, 57 S. Ct. 857;

Thornhill v. Alabama, 310 U.S. 88, 84 L. Ed. 1093, 60 S. Ct. 736.

The fact that respondents employed no member of the Union did not make the picketing unlawful so as to put it beyond the protection of the Fourteenth Amendment, as was held by the majority of the Washington Supreme court.

American Federation of Labor v. Swing, 312 U.S. 321, 85 L. Ed. 855, 61 S. Ct. 568;

Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 769, 86 L. Ed. 1178, 62 S. Ct. 816;

Cafeteria Employees Union Local 302 v. Angelos, 320 U.S. 293, 88 L. Ed. 58, 64 S. Ct. 126.

The Washington supreme court in the majority opinion said:

> "* * *; nor do we believe that the United States supreme court has ever said that a state is without power to abridge this right (free speech) *where such a course is necessary to protect property rights* and is in the general interests of the community." (Emphasis supplied) (R. 27).

The judges who joined in that opinion apparently have not carefully read the decision of this Court in the *Swing* case, *supra*, in which this Court said:

> "Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* Case." (312 U.S. 321, 326)

In *Thornhill's* Case, *supra*, the Court had previously said, in part:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible content open to industrial combatants. See Mr. Justice Brandeis in *Duplex Printing Co. v. Deering*, 254 U.S. 443, at 488, 65 L. Ed. 349, 365, 41 S. Ct. 172, 16 A.L.R. 196. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A

contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.

"* * * *It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute.* Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group of society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistant with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. *We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.*" (Emphasis supplied)

And before *Thornhill's* case, in *Senn's* case, Justice Brandeis, speaking for the Court, had said, concerning this matter:

"The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support to induce Senn to unionize his shop. (301 U.S. 468, 480) * * *.

"It is true that disclosure of the facts of the

labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. * * * It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right." (301 U.S. 482)

Shively v. Garage Employees Local Union No. 44, 6 Wn.(2d) 560, 108 P.(2d) 354, cited and discussed in the majority opinion (R. 27), was decided a few days before this Court rendered its decision in *American Federation of Labor v. Swing, supra.* The Washington court there, holding that picketing was unlawful in the absence of any employer-employee relationship, relied upon the decision of the Court below in the *Swing* case. In the course of the opinion in the *Shively* case the Washington supreme court, in denying the union's claimed right to peacefully picket under the Fourteenth Amendment, said at page 570:

"It is for this state to determine, under the exercise of its police powers, what conduct of its citizens shall be lawful and what shall not be. *Of course, the state may not declare unlawful that which the constitution of the United States, as interpreted by the supreme court of the United States, has expressly made lawful. However, so far as we have been able to determine, on no occasion has the supreme court of the United States held that the state courts may not enjoin a labor union from engaging in unlawful picket-*

ing (unlawful under the laws and decisions of that state) because of any inhibition to be found in the fourteenth amendment." (Emphasis supplied)

The Supreme Court of Washington has now done in this case and in the *Gazzam* and *Cline* cases precisely what it previously had said it may not do—it has declared "unlawful" that which the Constitution of the United States, as interpreted by this Court, has expressly made lawful.

IV.

PUBLIC POLICY

The respondents now urge for the first time that the picketing was unlawful because it violated the declaration of public policy in the Washington anti-injunction statute. (Rem. Rev. Stat. (Supp.) 7612-2, quoted at page 4 of respondents' brief.) This contention was neither urged below nor passed upon by the trial or supreme court. Those courts held that the picketing was coercive and unlawful under the common law of the state. However, this declaration of public policy, assuming it does not infringe the Federal constitution, would apply only to the employers of labor and their employees. It says that the *employee*

"* * * shall be free from interference, restraint, or coercion of *employers of labor*, or their agents, in the designation of such representatives or in self-organization or in any other concerted activities for the purpose of collective bargaining or mutual aid or protection * * *." (Emphasis supplied)

If, as contended by respondents, the Washington

supreme court has construed this declaration of public policy to mean that peaceful picketing in the absence of a direct employer-employee relationship is unlawful, our answer is that, as so construed, the statute infringes the Fourteenth Amendment. This Court has held that neither the legislature nor the courts of the state may thus confine the scope of the Fourteenth Amendment.

American Federation of Labor v. Swing, 312 U.S. 321, 85 L. Ed. 855, 61 S. Ct. 568;

Cafeteria Employees Union v. Angelos, 320 U.S. 293, 88 L. Ed. 58, 64 S. Ct. 126.

In the first of these cases the Court said:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, *whether those limits be defined by statute or by the judicial organ of the state.* A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." (312 U.S. 326) (Emphasis supplied)

CONCLUSION

In conclusion we respectfully submit that the Supreme Court of Washington has held that peaceful picketing by a labor union is "unlawful" where there is no immediate employer-employee dispute and, being thus unlawful, is not protected by the Fourteenth Amendment. This holding, we submit, is directly in conflict with the decisions of this Court, cited above. The decree which the Supreme Court of Washington affirmed in this case permanently enjoins the petitioners from "in any manner picketing respondents' place of business" and in so doing deprives them of the right of freedom of speech guaranteed by the First and Fourteenth Amendments. And for these reasons the decree should be reversed.

Respectfully submitted,

SAMUEL B. BASSETT,
JOHN GEISNESS,
Attorneys for Petitioners.